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No. 14

In the

Supreme Court of the United States

OCTOBER TERM, 1962

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for I.C.T. INSURANCE COMPANY,
Appellee.

No. 15

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Supreme Court of the United States

OCTOBER TERM, 1962

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for I.C.T. INSURANCE COMPANY,
Appellee.

On Appeal from the Supreme Court of Texas

SUPPLEMENTAL BRIEF OF APPELLEE C. H. LANGDEAU, RECEIVER

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Appellee respectfully submits this Supplemental Brief in response to Supplemental Briefs filed herein by both Appellant National Banks.

I.

HISTORICAL BACKGROUND OF NATIONAL BANKS

The first National Bank was chartered by Act of Congress in 1791, 1 Stat. 181, and was known as "The Bank of the United States." Its Charter was allowed to expire without renewal in 1812.

The second Bank of the United States was created by Act of Congress in 1816. This Charter was for a term of twenty years and was allowed to expire during the administration of Andrew Jackson without renewal or extension in 1836.

There were no National Banks in existence from 1836 until 1863, when Congress, on February 25, 1863 (12 Stat. at L. 668) enacted the present National Banking Act, which has come down to us with amendments to the present time.

JURISDICTION AND VENUE OF SUITS

The Charter for the Bank of the United States, granted by Congress in 1791, expressly authorized the Bank "to sue and be sued * * * in any Court of record, or in any other place whatsoever." 1 Stat. 181.

The Supreme Court of the United States in *Bank of the United States v. Deveaux, 5 Cranch 85 (1809)*, decided that the foregoing language of the Charter enacted in 1791 did not give the United States Circuit Court jurisdiction, since the then existing Judicial Acts did not otherwise extend the jurisdiction of the Circuit Courts to include the Bank. The

Court stated that this power granted to the corporation, "* * * is not understood to enlarge the jurisdiction of any particular Court * * *."

The Charter of the second National Bank of the United States took into account the decision in the *Deveaux* case and contained the following additional language, "be made able and capable in law to sue and be sued * * * in all State Courts having competent jurisdiction, and in the Circuit Courts of the United States." This additional language of the second Bank's Charter was the outgrowth of the *Deveaux* case.

In *Osborn v. Bank of the United States, 9 Wheaton 204 (1824)*, Chief Justice Marshall held that the new and additional language contained in the Charter of the second National Bank authorized the Bank to sue and be sued in the Circuit Courts of the United States, and that Congress had the constitutional power to enact the Legislation.

Mr. Justice Bradley of this Court, in *Claflin v. Houseman, 13 U. S. 130, 23 L. Ed. 833, 838 (1876)*, had the following to say with reference to the *Deveaux* case:

> "The case is exactly the same as that of the bank of the United States. The first bank chartered in 1791 had capacity given it 'to sue and be sued * * * in Courts of record or in any other place whatsoever.'" (1 Stat. at L. 191.)
>
> "It was held in *Bank v. Deveaux, 5 Cranch 61*, that this did not authorize the Bank to sue in Courts of the United States, without showing proper citizenship of the parties in different states. The Bank WAS OBLIGATED TO SUE IN THE STATE COURTS." (Em-

> phasis supplied.) * * * "The second Bank of the United States had express authority 'to sue and be sued in all State Courts having competent jurisdiction, and in any Circuit Court of the United States.' * * * In the case of *Osborn v. The Bank of The United States* it was objected that Congress had not authority to enable the Bank to sue in Federal Courts, merely because of its being created by an Act of Congress, but the Court held otherwise, and sustained its right to sue therein. No question was made of its right to sue in the State Courts."

Quite naturally when the first National Banking Act was passed on February 25, 1863, it not only included the language "to sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons," (12 Stat. 668, Sec. 11, * * * FOURTH); but it also contained the language that had been thought necessary as a result of the *Deveaux* case to give the Federal trial Courts jurisdiction, as follows (12 Stat. 681, Sec. 59):

> "And be it further enacted that suits, actions and proceedings by and against any association under this Act, may be had in any Circuit, District or Territorial Court of the United States held within the district in which such association may be established."

This was not a venue statute, but undoubtedly was considered necessary to give jurisdiction as a result of the historical experience in the case of the *Bank of the United States v. Deveaux*. This language was supposed to give the Circuit Court, District and Territorial Courts jurisdiction that they would not otherwise have possessed.

Since the *Deveaux* case it seems to have been thought necessary to specifically authorize suits by or against the

Bank of the United States in State Courts, although no case had ever decided that they did not have jurisdiction, by reason of the authority and power "to sue and be sued, in any Court of law and equity, as fully as natural persons." The original National Banking Act of 1863, which had not mentioned State Courts, was repealed and the Act of 1864 was passed, which included the following language (13 Stat. 116, Sec. 57):

> "That suits, actions and proceedings against any association under this Title may be had in any Circuit, District, or Territorial Court of the United States held within the District in which such association may be established, or in any State, County or City in which said association is located, having jurisdiction in similar cases."

It is the position of the Appellee, from a historical viewpoint, that it was thought necessary to expressly give the State Courts jurisdiction. This was not a matter of venue. This is a part and parcel of the same Section that granted jurisdiction to the Federal Courts.

It is Appellee's position that Congress was affirmatively granting authority for suits in Federal and State Courts, believing it to be necessary because of the *Deveaux* case, and was not attempting to limit the Courts in which suits might be brought by or against National Banks. This point is made because Congress possessed no power to enlarge the jurisdiction of State Courts which they possessed under their respective Constitutions and Statutes.

It is Appellee's further position that the following language which first appeared in substance in the Charter of

the first Bank of the United States, and which has been a part of all subsequent Charters and National Banking Acts, is the real affirmative authority for National Banks to sue and be sued in Federal and State Courts as fully as natural persons or private corporations:

> "To sue and be sued, complain and defend in any Court of law and equity, as fully as natural persons." (12 U.S.C. Sec. 24, 1940 Ed.; 12 St. at L. Page 668, Sec. 11; 13 St. at L. Page 101, Sec. 8; Revised Stat. of U. S., Sec. 5136.)

It is respectfully submitted that 12 U.S.C. Sec. 24, * * * FOURTH, authorizing National Banks "to sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons," has at all times authorized and empowered State Courts otherwise having jurisdiction to entertain suits by and against Banks, and that the further language contained in 12 U.S.C., Sec. 94, with reference to State, County and Municipal Courts was unnecessary and was intended as an affirmative grant of authority rather than a restriction on the jurisdiction of State Courts.

II.

DECIDED CASES

The first decision concerning the present Statute (12 U.S.C., Sec. 94) was *Casey v. Adams, 102 U. S. 66, 26 L. Ed. 52 (1880)*, specifically held that the Statute was not applicable to a suit filed in a State Court in Louisiana to foreclose a mortgage on real property; the suit being filed in the Parish in which the land was located. The National Bank was located in another Parish, and was made a party

defendant and urged that it had to be sued in the County where the Bank was located. The Supreme Court overruled the National Bank's plea, and held that this was a "local action" and that the Statute was not applicable. Likewise, the Supreme Court in *First National Bank v. Fellows, Ex Rel Union Trust Company, 61 L. Ed. 1233 (1917)*, speaking through Chief Justice White, decided that a quo warranto proceeding instituted at the State Capitol in Michigan in Ingram County could be sustained against the National Bank located in Bay City, Bay County, Michigan. The Bank urged that it could only be sued in its own County, and Mr. Justice Vandeventer in his dissent expressly asserts that in his opinion the Act of 1864 (now 12 U.S.C. Sec. 94) should have controlled.

Appellants urge the case of *First National Bank of Charlotte, N. C. v. Morgan, 132 U. S. 141, 33 L. Ed. 282 (1889)*. It is respectfully submitted that this case does not decide the point. This was a suit by Morgan against the National Bank to enforce the penalty created by Act of Congress for charging usurious interest. (Revised Statutes of United States, Section 5198.) It will be recalled that at this time the language of 12 U.S.C., Sec. 94 was a part of this Usury Section of the Federal Statute. The suit was in a State Court in Cleveland County, North Carolina. The Bank appeared and made a defense to the suit without first entering a plea to the jurisdiction of the Court or the venue. After losing the case in the trial Court, the National Bank asserted, for the first time, on appeal, that it could only be sued in the County where its Bank was located. Mr. Justice

Harlan delivered the opinion of the Court and stated that it was a suit to recover penalty incurred under a law of the United States. He then went on to hold that the Bank had waived its privilege to be sued in the County of its location, and that the State Court in the other County had jurisdiction. Since the right or privilege of the Bank, if it had such, was waived, this case does not decide the point.

The next case chronologically is *Bank of America v. Whitney Central National Bank, 261 U. S. 171, 67 L. Ed. 594*, wherein Justice Brandeis expressly refused to determine this very question in the following language:

> "Whether a national bank could under any circumstances, be subjected, without its consent, to suit in a state or district other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case."

Finally, *Cope v. Anderson, 331 U. S. 461, 91 L. Ed. 1602 (1946)*, makes passing reference to 12 U.S.C., Section 94, although it was not in any way involved in the decision of the case.

The foregoing are all of the cases that deal with the particular Statute in question.

III.

12 U.S.C. REPEALED BY THE PROVISO TO THE ACT OF JULY 12, 1882

The amendment of February 18, 1865 (18 Stat. at L. 320; Section 5198 of the Revised Statutes of the United States), which has come down to us as 12 U.S.C., Sec. 94, if it is

to be construed as a restriction on State Court jurisdiction, was repealed by the Act of July 12, 1882 (22 Stat. at L. 162), which first authorized the extension of Charters to National Banks for an additional twenty years, and then stated:

> "Provided, however, that the jurisdiction for suits hereafter brought by or against any association established under any law providing for National Banking Associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such National Banking Association may be doing business when such suits may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

In *Leather Manufacturers' National Bank v. Cooper, 120 U. S. 778, 30 L. Ed. 816 (1887)*, this Court stated with reference to this Act of 1882:

> "This was evidently intended to put National Banks on the same footing as the banks of the State where they were located for all the purposes of the jurisdiction of the Courts of the United States."

However, the language of the Act itself was not limited to jurisdiction of the Courts of the United States, but refers to "jurisdiction of suits thereafter brought by or against (national) banks 'shall be the same as, and not other than, the jurisdiction for suits by or against Banks not organized under the laws of the United States which do or might do banking business where such National Banking Association may be doing business when such suits may be begun.'"

It is true that the only cases reaching the Supreme Court of the United States relating to this enactment involved the right of removal from State Courts to Federal Courts, and no decision exists with reference to whether this Act of 1882 repealed the conflicting part of Section 5198 of the Revised Statutes of the United States (1874) as amended by the Act of February 18, 1875. (18 Stat. 320.)

This Act of 1882 was not repealed by Congress until June 25, 1948, when in passing the new Judiciary Act, it expressly included the proviso to the Act of July 12, 1882, in a long list of Statutes to be repealed, effective September 1, 1948.

As a matter of fact, this Act of 1882 was a part of the Banking Act and not a part of the judiciary provisions, and there is no indication as to why it was included in the repealing provision.

However, if it effectively repealed the predecessor of 12 U.S.C., Sec. 94, its subsequent repeal sixty-six years later would not re-enact 12 U.S.C., Sec. 94.

This Act of July 12, 1882 was, of course, passed after the decision in *Casey v. Adams (1880)*, and was not relied upon by the Court.

In *The First National Bank of Charlotte, N. C. v. Morgan, 132 U. S. 141, 33 L. Ed. 282*, decided by the Supreme Court in 1889, the Court expressly excludes consideration of the Act of July 12, 1882, 22 Stat. 162, 163, Sec. 4, in the following language:

> "That proviso refers only to suits by or against National Banking Associations brought after the passage

of that Act. The present suit was commenced before that date."

IV.

A "NO-MAN'S LAND" AREA WHERE NO COURT HAS JURISDICTION

If the constructions urged on this Court by Appellants is adopted, then Congress will have created an effective "no-man's land" area where no Court, Federal or State, has jurisdiction.

This is well illustrated in the case of *Okeechobee v. Florida National Bank, 150 So. 124 (Fla. 1933)*, in which two National Banks, both necessary parties to the suit, were defendants. These two Banks were located in different Counties. The Florida Court effectively described the intolerable situation that would be created by such a construction of the Federal Statute, as follows:

> "If this be not true, then the Complainant below in this case, the appellant here, can never enforce its legal rights for the alleged breach of the contract. Both Banks are necessary parties to the suit. The suit could not be maintained against one under the allegations of this bill of complaint without the other being joined in that suit, and if the Florida National Bank of Jacksonville may not be sued upon its joint contract in Okeechobee County and People's Bank of Okeechobee cannot be sued on its joint contract in Duval County, then there is no jurisdiction in which the complainant may maintain its suit."

This was a case where the two National Banks were necessary parties to the suit, and the presence of both Banks was required before the State Court could proceed.

Other illustrations are not difficult to find. Suppose a National Bank sues in a State Court for title to real property located in a County different from that in which the Bank is located. Historically, as well as by Statute, such suits must be brought in the County or District wherein the real property is located. The Texas Statute on this subject, Article 1995, Section 14, Texas Revised Civil Statutes, 1925, states that such suits "must" be brought in the County where the land is situated. This must be true in most, if not all, of the other States of the Union. Yet, Appellants are saying that when a National Bank sues or is sued for title to real property, the suit must be brought in the County wherein the Bank is located. If under State practice, the suit cannot be brought in such County, then no Court, Federal or State, would have jurisdiction of such cause.

Another example is a suit in which a County is a party defendant, and which under local practice must be brought in such County. In Texas this is governed by Article 1995, Section 19, Texas Revised Civil Statutes.

A further example is a suit in which an Administrator of an Estate of a deceased person, or a guardian, is a party defendant, which commonly must be brought in the County wherein the administration or guardianship is pending.

A suit for mandamus against the head of a department of State Government is required in Texas to be brought in Travis County (State Capitol), Article 1995, Sec. 20, Texas Revised Civil Statutes.

Suits to revise the proceedings of the County Court in matters of probate must be brought in the District Court of the County in which such proceedings were had. Article 1995, Section 18, Texas Revised Civil Statutes.

V.

RECENT DECISION OF THE SUPREME COURT OF TEXAS

Appellants submit the recent decision by the Supreme Court in *Langdeau v. Burke Investment Co., 358 S. W. 2d 553 (1962)*. It is asserted that this decision completely refutes the argument that the case at bar is a "local action" under *Casey v. Adams*. Land has always occupied a unique position in the history of man and in the history of the jurisprudence, and it is not surprising to find that the Supreme Court of Texas holding that the venue statute governing suits concerning the title to land controls over all other sections of the venue statute.

The *Burke Investment Company* case in no way holds or implies that Art. 21.28 of the *Insurance Code of Texas*, as Amended (Acts of 1955, 54th Legislature, Pages 737, 742, Chapter 267, captioned "Liquidation, Rehabilitation, Reorganization or Conservation of Insurers," Section 4(f), does not control the venue in this particular lawsuit which does not involve the title to land. In fact, in this very case, *Langdeau v. Republic National Bank of Dallas, 161 Tex. 349, 341 S. W. 2d 161*, the Supreme Court of Texas held that

venue is fixed and controlled in Travis County by the Texas Statutes, which read:

> "Sec. 4(f) NEW LAWSUITS. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

Article 21.28 of the *Insurance Code of Texas*, Section 1(f), in which the word "Court" is defined as follows:

> " 'Court' unless the same clearly appears to the contrary from the text of this article, means the Court in which the delinquency proceeding is pending."

Except in the single instance of the suit involving title to land (*Langdeau v. Burke Investment Company*), the Courts of Texas have held that Article 21.28 of the *Insurance Code of Texas* fixes and controls venue in the County where the delinquency proceedings are pending. *Bouknight v. Williamson, 314 S. W. 2d 429 (Writ of Error Dismissed); Atkins v. Wheeler, 307 S. W. 2d 294 (Writ of Error Dismissed); Johnson v. Wheeler, 312 S. W. 2d 266.*

Casey v. Adams, 102 U. S. 68, 26 L. Ed. 52 (1880), held that the predecessor of 12 U.S.C.A., Section 24, was not intended by Congress "to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. * * * and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either *by statute* (emphasis supplied) or the common law, unless it was expressly so declared * * *."

The present case is made a "local action" by statute.

It is respectfully submitted that this particular case is made a "local action" by the *Insurance Code of Texas*, and that this is not changed by the decision of the Supreme Court of Texas in the *Burke Investment Company* case involving the title to land.

CONCLUSION

Appellee respectfully prays that the Court find that the 98th District Court of Travis County, Texas, the County in which the delinquency proceeding against I.C.T. Insurance Company is pending, has jurisdiction to hear and determine this cause, and that for all of the reasons set out herein 12 U.S.C., Section 94, does not control the jurisdiction or venue of this proceeding.

Respectfully submitted,

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PROOF OF SERVICE

I, W. E. CURETON, one of the attorneys for C. H. LANGDEAU, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on December , 1962, I served copies of the foregoing Brief of Appellee on the Appellants by depositing the same in the United States Mail, with first-class postage prepaid, addressed to counsel of record for Appellants to each of them at the following post office addresses:

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